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No. 09-227

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

RICHARD MYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioners' constitutional claims were properly dismissed because respondents are entitled to qualified immunity.

2. Whether the court of appeals correctly held that petitioners' claim under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, was properly dismissed because, at a minimum, respondents are entitled to qualified immunity.

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 3a-22a, 27a-90a) are reported at 563 F.3d 527 and 512 F.3d 644. The opinions of the district court (Pet. App. 95a-122a, 125a-168a) are reported at 433 F. Supp. 2d 58 and 414 F. Supp. 2d 26.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on April 24, 2009. On July 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are four British citizens who were taken into custody in Afghanistan in the months following the attacks of September 11, 2001. Pet. App. 127a, 183a-184a. According to the allegations in their complaint, which are not conceded but must be taken as true for present purposes, three of the petitioners were captured by a warlord in Afghanistan in November 2001 and then turned over to the United States. *Id.* at 183a. The fourth petitioner alleges he was captured by the Taliban, released, and then detained by U.S. forces. *Id.* at 183a-184a. All four petitioners were transferred to the U.S. Naval Base at Guantanamo Bay, Cuba (Guantanamo Bay) in early 2002 and released in March 2004. *Id.* at 185a, 207a, 225a.

2. After petitioners were released from United States custody and transferred to the United Kingdom, they brought this civil action for damages against then-Secretary of Defense Rumsfeld and ten senior military officers in their individual capacities. Pet. App. 4a. Petitioners alleged that they suffered inhumane treatment, some of which they asserted constituted torture, at the hands of unidentified U.S. military personnel. *Id.* at 185a-186a, 207a-225a. They also alleged that U.S. military officials infringed on the practice of their religion, at times interfering with their prayers and withholding or desecrating copies of the Koran. *Id.* at 241a. Petitioners alleged that "[t]he torture, threats, physical and psychological abuse inflicted upon [petitioners] were devised, approved, and implemented by Defendant Rumsfeld and other [respondents] in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees." *Id.* at 226a. Petitioners further alleged that respondents knew that petitioners were tortured or mistreated, "took no steps to prevent the infliction of torture

and other mistreatment," and "authorized and encouraged the infliction of torture and other mistreatment against [petitioners]." *Id.* at 231a.

Petitioners' complaint sought relief for alleged violations of international law, based on the Alien Tort Statute (ATS), 28 U.S.C. 1350 (Counts 1-3). Pet. App. 232a-236a. Petitioners also claimed that respondents had violated unspecified provisions of the Third and Fourth Geneva Conventions (Count 4), *id.* at 236a-237a, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* (Count 7), Pet. App. 240a-242a, and the Fifth and Eighth Amendments to the United States Constitution (Counts 5 and 6), *id.* at 237a-240a. The cause of action for petitioners' constitutional claims was based on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), 28 U.S.C. 2679(b) and (d), the Attorney General (through his designee) certified that "at the time of the conduct alleged in the complaint," the individual respondents "were acting within the scope of their employment as employees of the United States," and substituted the United States for the individual respondents as the defendant on the claims for violations of international law under the ATS and for violations of the Geneva Conventions. C.A. App. 60; see 28 U.S.C. 2679(b)(1) (making a suit against the United States the exclusive remedy for seeking money damages for the wrongful act or omission of a government employee acting within the scope of employment). Respondents moved to dismiss those counts because petitioners had not filed an administrative claim under the Federal Tort Claims Act (FTCA), ch. 753, Tit. IV, 60 Stat. 842. Respondents also

moved to dismiss the constitutional and RFRA claims on the basis of qualified immunity.

3. a. In its initial decision, the district court deferred consideration of the RFRA claim but granted respondents' motion to dismiss the other claims. Pet. App. 125a-168a. On the ATS and Geneva Convention claims, the court held that the United States had been properly substituted for the individual defendants. *Id.* at 133a-134a. Applying the *respondeat superior* law of the District of Columbia, the court held that respondents were acting within the scope of their employment when the alleged acts occurred. *Id.* at 139a-147a. After substituting the United States, the court dismissed the claims because petitioners had not filed an administrative claim under the FTCA. *Id.* at 153a-154a.

b. On the constitutional claims, the district court held that respondents are entitled to qualified immunity. Pet. App. 154a-166a. The court declined to determine whether petitioners' allegations stated claims of constitutional violations, holding that respondents are entitled to qualified immunity because any constitutional rights possessed by Guantanamo Bay detainees were not clearly established at the time of the conduct. *Id.* at 156a-166a.

c. After supplemental briefing, the district court addressed petitioners' RFRA claim and denied respondents' motion to dismiss. Pet. App. 95a-122a. Noting that the statute extends by its terms to "each territory and possession of the United States," 42 U.S.C. 2000bb-2(2), the court held that Guantanamo Bay is a "possession" of the United States within the meaning of the statute. Pet. App. 105a-107a. The court then held that RFRA applies to non-resident aliens like petitioners because aliens detained at Guantanamo Bay are "persons" for purposes of RFRA. *Id.* at 112a-113a. It also held that respondents are not entitled to qualified immunity on the RFRA claim because the

rights of Guantanamo Bay detainees under RFRA were clearly established at the time of petitioners' detention. *Id.* at 115a-122a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 27a-90a.

a. The court of appeals first held that petitioners' claims against the individual respondents under the ATS were properly dismissed pursuant to the Westfall Act. Applying District of Columbia law concerning the scope of employment, the court concluded that, taking the allegations in the complaint as true, respondents had acted within the scope of their employment. Pet. App. 45a-56a. The court held that the ATS claims were properly regarded as claims against the United States under the FTCA. *Id.* at 54a. The court then held that the district court correctly dismissed the FTCA claims because petitioners had not presented an administrative claim under the FTCA. *Id.* at 55a-56a.

For the same reason, the court of appeals affirmed the dismissal of petitioners' claim under the Geneva Conventions. It held that the alleged conduct falls within the scope of employment, and a suit against respondents is precluded by the Westfall Act. Pet. App. 58a-59a.

b. The court of appeals affirmed the dismissal of petitioners' *Bivens* claims asserting violations of their Fifth and Eighth Amendment rights. Pet. App. 60a-68a. The court observed that it had recently held in *Boumediene* v. *Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2229 (2008), that detainees at Guantanamo Bay lacked constitutional rights because they were aliens without property or presence in the United States. Pet. App. 60a-61a.

The court of appeals also held that, "[e]ven assuming *arguendo* the detainees can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to

[respondents'] assertion of qualified immunity." Pet. App. 65a. The court observed that, even before its decision in *Boumediene*, "courts did not bestow constitutional rights on aliens located outside sovereign United States territory." *Id.* at 66a. The court also held that, "[b]ased on the plain text of the lease [between the United States and Cuba] and on case law, it was not clearly established at the time of the alleged violations * * * that a reasonable officer would know that Guantanamo is sovereign United States territory." *Id.* at 68a.

c. The court of appeals held that the district court erred in denying respondents' motion to dismiss the RFRA claim. Pet. App. 69a-78a. Finding it unnecessary to address whether RFRA generally applies extraterritorially, the court determined that petitioners were not covered by the statute. *Id.* at 69a-70a & n.19.

The court of appeals explained that RFRA's purpose was "to restore what, in the Congress's view, is the free exercise of religion guaranteed by the Constitution." Pet. App. 76a. Because this Court had held in *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950), and *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), that certain constitutional provisions did not apply to non-resident aliens outside the United States, and because petitioners were aliens outside sovereign United States territory at the time of the alleged actions for which they sought damages under RFRA, the court of appeals concluded that petitioners did not fall within the "person[s]" to whom RFRA applies. Pet. App. 77a-78a.

d. Judge Brown concurred. Pet. App. 79a-90a. She agreed that the claims based on the ATS and Geneva Conventions must be dismissed. *Id.* at 79a. She also agreed that the *Bivens* claims for alleged constitutional violations were properly dismissed, but she reached that conclusion

without addressing the applicability of the Fifth and Eighth Amendments to Guantanamo Bay detainees. She would have held that special factors counsel hesitation in the creation of a *Bivens* remedy in this context, relying on circuit precedent refusing to recognize a *Bivens* action "for Nicaraguans who brought claims against U.S. government officials for supporting the Contras" because such a cause of action would have significant national security and foreign policy implications. *Id.* at 80a-82a (discussing *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985)).

Judge Brown also concurred in the majority's holding that the RFRA claim must be dismissed, but for different reasons. She disagreed with the panel's holding that the term "person," as used in RFRA, did not apply to nonresident aliens. Pet. App. 83a-87a. But she concluded that petitioners still could not prevail, because other factors left no doubt that Congress did not intend for RFRA to apply to petitioners. *Id.* at 87a. Judge Brown reasoned that "[a]ccepting [petitioners'] argument that RFRA imports the entire Free Exercise Clause edifice into the military detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate." *Id.* at 89a. Moreover, even if that were not true, Judge Brown stated that she "would have no trouble concluding [that respondents] are protected by qualified immunity," because RFRA's application to aliens like petitioners was not clearly established at the time of their detention. *Id.* at 88a-90a.

5. Petitioners filed a petition for a writ of certiorari. This Court granted the petition, vacated the judgment of the court of appeals, and remanded for further consideration in light of its intervening decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008). Pet. App. 25a-26a.

6. On remand from this Court, after receiving supplemental briefing (Pet. App. 23a-24a), the court of appeals reinstated its prior judgment, but "on a more limited basis." *Id.* at 4a.

a. The court of appeals held that petitioners' *Bivens* claims had been properly dismissed. Pet. App. 6a-13a.[1] It expressly declined to decide whether the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment apply to Guantanamo Bay detainees. *Id.* at 7a-8a. Instead, the court of appeals explained that its "decision on remand" rested on qualified-immunity grounds, rather than any determination about the merits of petitioners' constitutional claims. *Id.* at 8a. In light of *Pearson* v. *Callahan*, 129 S. Ct. 808 (2009), the court of appeals concluded that it should decline to pass on the underlying constitutional questions, and instead decide only whether the law was "clearly established" for purposes of qualified immunity. Pet. App. 8a. The court determined that "[c]onsiderations of judicial restraint" rendered it unnecessary to decide the constitutional questions because "[t]he immunity question is one that we can 'rather quickly and easily decide' * * * —and already have." *Ibid.* (quoting *Pearson*, 129 S. Ct. at 820). After surveying the prior case law declining to extend constitutional rights to aliens outside the sovereign territory of the United States, the court concluded that, at the time petitioners were detained, "there was no authority for

[1] With respect to petitioners' claims based on the ATS and the Geneva Conventions, which had been dismissed after substitution of the United States for the individual defendants under the Westfall Act, the court of appeals noted that petitioners had made no attempt to show that *Boumediene* affected those claims, and therefore reinstated that aspect of its judgment. Pet. App. 6a. Petitioners do not seek review of that ruling in this Court.

—and ample authority against [petitioners'] asserted rights," and held that respondents "are therefore entitled to qualified immunity." *Id.* at 10a-13a.

The court of appeals also held that there was "an alternative ground for dismissing [petitioners'] *Bivens* claims," holding that special factors counsel against inferring a *Bivens* remedy in the context of this case, particularly in light of "the danger of obstructing U.S. national security policy." Pet. App. 13a n.5. It concluded that this alternative basis for its judgment was "also unaffected by the Supreme Court's *Boumediene* decision." *Id.* at 14a n.5.

Finally, the court of appeals reinstated its previous holding that petitioners' RFRA claim must be dismissed. Pet. App. 14a-15a. The court explained that its "vacated opinion held as a matter of statutory interpretation that [petitioners] were not protected 'person[s]' within the meaning of RFRA," and concluded that *Boumediene* had not affected that interpretation. *Id.* at 14a. In the alternative, the court also held that respondents are entitled to qualified immunity on petitioners' RFRA claim, "for the reasons stated in Judge Brown's initial concurring opinion." *Id.* at 15a n.6 (citing *id.* at 88a & n.31).

b. Judge Brown concurred. Pet. App. 16a-22a. She joined the majority opinion "in full as to [petitioners'] *Bivens* claims and to the extent it disposes of [petitioners' RFRA] claim[] under the doctrine of qualified immunity." *Id.* at 16a. With regard to the court's alternative holding on the RFRA claim, she again disagreed with the majority's reasoning that petitioners are not "person[s]" within the meaning of the statute. *Id.* at 16a-20a. She nevertheless reiterated her view that allowing petitioners to seek relief under RFRA would yield a result "demonstrably at odds" with the intentions of Congress, and observed that accepting petitioners' arguments for the application of RFRA in

this case "would revolutionize the treatment of captured combatants in a way Congress did not contemplate." *Id.* at 21a (internal quotation marks omitted). She therefore agreed with the majority's holding that petitioners' RFRA claim should be rejected.

ARGUMENT

The court of appeals dismissed petitioners' *Bivens* claims on two grounds. The court held that petitioners have no cause of action because special factors counsel hesitation in inferring a cause of action for damages in this military setting. Petitioners do not challenge that holding, and it would not warrant review if they had, because the holding is correct, is supported by decisions of this Court, and does not conflict with a decision of another court of appeals. Given that petitioners do not challenge the holding below that they have no cause of action under *Bivens*, there is no occasion to consider the court's further holding that respondents are entitled to qualified immunity on petitioners' constitutional claims. But that alternative holding too is correct, because it was not clearly established at the time petitioners were detained at Guantanamo Bay that they had the constitutional rights they claim were violated. The court of appeals' holding that respondents are entitled to qualified immunity does not conflict with decisions of this Court or other courts of appeals and arises out of a period of detention that ended more than five years ago. Further review is not warranted.

Nor is review warranted of the court of appeals' holding that petitioners' RFRA claim must be dismissed. The court of appeals' ruling on the application of RFRA to petitioners presents a narrow question of interpreting a particular statute based on its unique text and history. And even assuming that statutory decision is open to any question, re-

spondents are entitled to qualified immunity from petitioners' claim for damages under RFRA. The dismissal of petitioners' RFRA claim was correct and does not conflict with decisions of this Court or other courts of appeals.

1. The court of appeals' affirmance of the dismissal of petitioners' *Bivens* claims for alleged violations of the Fifth and Eighth Amendments (Pet. App. 36a-44a) presents no issue for this Court's review. Torture is illegal under federal law, and the United States government repudiates it. But the availability of claims for monetary damages against individual officials raises distinct questions. In this case, the court of appeals properly rejected petitioners' *Bivens* claims.

a. The court of appeals correctly held that petitioners' constitutional claims must be dismissed on the ground that special factors preclude judicial fashioning of a *Bivens* cause of action under the circumstances of this case. Pet. App. 13a n.5.

Petitioners do not challenge that holding, which is an independent ground for the court of appeals' affirmance of the dismissal of their constitutional claims. Nor would that holding warrant this Court's review even if petitioners had raised it. The court of appeals' ruling is fully consistent with this Court's decisions governing recognition of new causes of action under *Bivens* in sensitive circumstances such as these. And there is no conflict in the courts of appeals on the question whether a cause of action for damages should be inferred under the Constitution against military officials by detainees held in military custody.

This Court has instructed courts to "pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). Indeed, this Court has previously

suggested that a limitation on a *Bivens* cause of action might be appropriate if the Fourth Amendment were held to govern actions that the military took against aliens abroad. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273-274 (1990). And the D.C. Circuit has previously held that special factors foreclosed a *Bivens* cause of action in circumstances analogous to those here. *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 205-206, 209 (1985) (declining to infer a *Bivens* cause of action "against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad"). The court of appeals correctly found "no basis for distinguishing this case from *Sanchez-Espinoza*," which was "unaffected" by this Court's decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), and accordingly concluded that petitioners' *Bivens* claims were foreclosed. Pet. App. 14a n.5.

Because petitioners do not challenge the court of appeals' holding that they have no cause of action through which to press their constitutional claims, any questions that might arise if petitioners had a cause of action are not properly presented in this case. For that reason alone, there is no basis for review of the court of appeals' dismissal of petitioners' constitutional claims.

b. Review is also unwarranted in light of the court of appeals' additional holding (Pet. App. 10a-13a) that respondents are in any event entitled to qualified immunity on petitioners' Fifth and Eighth Amendment claims. That holding is likewise correct and represents a straightforward application of settled principles governing qualified immunity.

Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818

(1982). To defeat qualified immunity, the right invoked must be "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). The asserted "unlawfulness must be apparent" in "light of pre-existing law." *Id.* at 640; see *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).

At the time of petitioners' detention (between 2002 and March 2004), it was not clearly established that the Fifth and Eighth Amendments protected aliens detained abroad by the military. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for instance, this Court rejected the contention that alien combatants held by the military outside the sovereign territory of the United States, at a military base in Germany, had a constitutional right to seek habeas corpus and rights under the Fifth Amendment. See also *Verdugo-Urquidez*, 494 U.S. at 269 (holding that Fourth Amendment did not apply to search of non-resident alien's property abroad, and discussing and quoting *Eisentrager*, 339 U.S. at 784); *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders") (citing *Eisentrager*, 339 U.S. at 784); see also *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *32 County Sovereignty Comm.* v. *Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002).

There were even cases that had specifically rejected a claim of constitutional rights for aliens at Guantanamo Bay. The Eleventh Circuit had held that alien refugees there had "no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1428 (11th

Cir.), cert. denied, 515 U.S. 1142, and 516 U.S. 913 (1995). And the D.C. Circuit concluded—during the period of petitioners' own detention—that the Fifth Amendment did not apply to aliens held at Guantanamo Bay. *Al Odah* v. *United States*, 321 F.3d 1134, 1140-1144 (2003), rev'd on other grounds *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). Even after this Court reversed *Al Odah* on statutory grounds and held that detainees at Guantanamo Bay could seek habeas relief under 28 U.S.C. 2241, see *Rasul* v. *Bush*, 542 U.S. 466, 476 (2004), district courts reached opposing conclusions about whether detainees at Guantanamo Bay had Fifth Amendment rights. See *Boumediene*, 128 S. Ct. at 2241 (describing district court opinions).

Petitioners' suggestion (Pet. 32-34) that *Boumediene* merely "reaffirmed" clearly established law is belied by this Court's own language in *Boumediene*, which stated that, "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." 128 S. Ct. at 2262.[2] Accordingly, the court of appeals was correct in concluding that it was not clearly established at the time of petitioners' detention that such noncitizens possessed Fifth and Eighth Amendment rights.

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[2] Even assuming *arguendo* that it could have been predicted after this Court's statutory ruling in *Rasul* that Guantanamo Bay, despite being under the formal sovereignty of Cuba, was sufficiently within the control of the United States to support constitutional habeas jurisdiction, see *Boumediene*, 128 S. Ct. at 2278 (Souter, J., concurring), that proposition was not affirmatively established until this Court decided *Boumediene*. And because the decision in *Rasul* itself came only after the events alleged in this case, it does not affect the qualified-immunity analysis.

Petitioners assert (Pet. 36) that the court of appeals "relied on the absence of any constitutional ruling directly on point" in holding that the law was not clearly established. They further criticize (Pet. 38) the court of appeals for "approach[ing] the question of qualified immunity here with a single, narrow question—was there a case holding that torture at Guantanamo [Bay] violated specific provisions of the Constitution?" Petitioners are correct that the absence of a ruling precisely on point in the particular factual circumstance does not necessarily preclude a right from being clearly established, if the constitutional rule already articulated in decisional law applies to that circumstance with "obvious clarity." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997). But petitioners' characterization of the court of appeals' decision as relying upon the mere absence of a ruling directly on point is unavailing. As the court of appeals held, there was no decisional law establishing with obvious clarity at the time of their detention that petitioners had rights under the Fifth and Eighth Amendments.

Despite petitioners' contentions to the contrary (Pet. 37-38), the court of appeals' decision is fully consistent with *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *Lanier*, *supra*. Those cases recognized that government officials can be on notice that their actions violate clearly established law "even in novel factual circumstances," *Hope*, 536 U.S. at 741, or in a case with extreme facts, because "[t]he easiest cases don't even arise," *Lanier*, 520 U.S. at 271 (internal quotation marks omitted). This is not, however, such a case. As discussed above, several cases had affirmatively rejected claims of constitutional rights by aliens outside the sovereign territory of the United States and within the *de jure* sovereignty of another nation, specifically including aliens at Guantanamo Bay.

Finally, petitioners assert (Pet. 26-27) that even if the application of the Fifth and Eighth Amendments to aliens detained at Guantanamo Bay was not clearly established at the time of their detention, qualified immunity still should not be recognized because petitioners have raised allegations of torture. But, as this Court has made clear, qualified immunity applies unless the defendant's alleged actions clearly violated the specific right that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."); *ibid.* ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon."); *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994) (to defeat immunity, "the clearly established right" must be "the federal right on which the claim for relief is based"). Here, petitioners base their claim on violations of the Fifth and Eighth Amendments, contending that those Amendments apply to aliens in Guantanamo Bay, and they thus must show that the rights guaranteed under *those* amendments (not any other statutory or constitutional rights) were clearly established at the time of their detention. The court of appeals correctly held that they were not.

That holding does not conflict with any decision of this Court or another court of appeals and is based on allegations of actions taken during a period of detention that ceased more than five years ago, before the first of this Court's decisions addressing issues arising out of detentions at Guantanamo Bay. Review by this Court of the court of appeals' qualified-immunity decision is therefore

unwarranted, especially because petitioners do not challenge the court of appeals' ruling that they have no cause of action under *Bivens* to begin with.

c. The court of appeals expressly did not rest its affirmance of the dismissal of petitioners' claims under the Fifth and Eighth Amendments on the proposition that aliens detained at Guantanamo Bay have no rights under those provisions of the Constitution (Pet. App. 7a-9a), instead concluding only that petitioners do not have a cause of action under *Bivens* in the circumstances presented here (*id.* at 13a-14a n.5) and that respondents would be entitled to qualified immunity in any such cause of action (*id.* at 9a-13a). Petitioners take issue (Pet. 14-18) with the court of appeals' determination not to decide in this case whether aliens detained at Guantanamo Bay have rights under the Due Process Clause and the Cruel and Unusual Punishments Clause, contending that such judicial restraint was inconsistent with the mandate of this Court's prior remand. That disposition, however, was well within the court of appeals' discretion.

Typically, when an official asserts a defense of qualified immunity in a suit alleging a violation of the Constitution, a court determines first whether the plaintiff has adduced facts sufficient to make out a constitutional violation. See *Saucier*, 533 U.S. at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Ibid.* If a violation could be made out, the court will then address whether the specific constitutional right, in the context presented, was "clearly established" at the time of the conduct alleged—*i.e.*, whether reasonable officials could have, at that time, disagreed about whether that constitutional right was established and applied to the context presented. *Ibid.*

Yet, as the court of appeals recognized (Pet. App. 8a), this Court recently held in *Pearson* v. *Callahan*, 129 S. Ct. 808 (2009), that a court addressing a defense of qualified immunity has discretion to bypass the threshold question of whether the plaintiff's allegations state a constitutional violation and instead simply to hold that the law was not clearly established at the relevant time. *Id.* at 818 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). The discretion recognized in *Pearson* thus allows a court, where appropriate, to adhere to "the general rule of constitutional avoidance," under which courts decline to "'pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *Id.* at 821 (ultimately quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)).

Here, the court of appeals expressly exercised that "sound discretion," *Pearson*, 129 S. Ct. at 818, in holding that constitutional issues not reached in *Boumediene* could be avoided because this case could, in the words of *Pearson*, be "quickly and easily decide[d]" on the ground that there was no violation of clearly established law. Pet. App. 8a (quoting *Pearson*, 129 S. Ct. at 820). That exercise of discretion was wholly proper under *Pearson* and does not warrant this Court's review.

Petitioners contend that, by exercising its discretion to avoid deciding constitutional questions, the court of appeals somehow "rebuffed this Court's mandate to reconsider this case in light of *Boumediene*." Pet. 14 (capitalization and emphasis omitted). But a remand order from this Court does not compel a lower court to decide an issue that is not ultimately necessary to the judgment; it "simply indicate[s]

that, in light of 'intervening developments,' there [is] a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which *may* affect the outcome of the litigation." *Tyler* v. *Cain*, 533 U.S. 656, 666 n.6 (2001) (emphasis added) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)).

This case was remanded to permit the court of appeals to reconsider its previous decision and to determine whether *Boumediene* affected the outcome. That is precisely what the court of appeals did. Rather than reinstate its prior opinion in full, the court rendered its judgment "on a more limited basis," exercising its discretion under *Pearson* not to decide a disputed constitutional question, and concluding that *Boumediene* did not "change[] the outcome" (Pet. App. 4a)—not only because the constitutional rights petitioners assert were not clearly established at the time of their detention, but also because petitioners do not have a cause of action under *Bivens* in which to assert those rights. Nothing about the court's avoidance of a constitutional decision in these circumstances warrants this Court's review.

2. The court of appeals' decision to dismiss petitioners' RFRA claim (Pet. App. 45a-54a) likewise does not warrant this Court's review. The court correctly held that respondents are entitled to qualified immunity from petitioners' claim for damages under RFRA. The court concluded as a matter of statutory construction that RFRA did not apply to petitioners when they were detained by the military at Guantanamo Bay, and that even if it did, that coverage was not clearly established when petitioners were detained. Those narrow holdings involve only issues of statutory interpretation and qualified immunity in a cause of action for damages under a particular statute based on conduct that ceased more than five years ago. And they do not conflict

with any decision of this Court or any court of appeals. They therefore do not present a fit issue for review by this Court.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless it "demonstrates that application of the burden to the person —(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1. RFRA also gives a statutory cause of action for damages to a "person whose religious exercise has been burdened." 42 U.S.C. 2000bb-1(c).

a. This statutory text alone does not clearly establish, for purposes of defeating qualified immunity, that RFRA applies in circumstances such as those presented here. RFRA does not define the term "person" as used in the statute. Nor does RFRA specify that it applies to aliens outside the sovereign territory of the United States.

Neither does anything in the background of the statute indicate the clearly established right that petitioners must possess to succeed on their RFRA claim against respondents. The history shows that Congress intended when it enacted RFRA in 1993 to reach practices that it regarded to fall within the general ambit of the First Amendment. As its title indicates, the Religious Freedom Restoration Act was intended to *restore* free-exercise rights for those who had previously been seen as having them. RFRA was enacted in response to this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), which held that, under the First Amendment, a generally applicable law may burden a religious exercise even when the government does not demonstrate a compelling interest for denying a religious exemption from the law. *Id.* at 884-889. As the statutory text says,

Congress's express purpose in RFRA was to "restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)," 42 U.S.C. 2000bb(b)(1) (emphases added), by establishing statutory rights to parallel the constitutional rights this Court had recognized in those decisions.

Congress thus intended to ensure that the compelling-interest test was applied to claims previously regarded as cognizable under the First Amendment. In fact, the original version of RFRA defined the term "exercise of religion" to mean "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. 2000bb-2(4) (1994) (amended 2000). When Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, it incorporated RLUIPA's definition of religious exercise into RFRA, see 42 U.S.C. 2000bb-2(4). While the new definition does not explicitly refer to the First Amendment, nothing in that statutory amendment suggests that "exercise of religion" was to have a substantially different meaning. Thus, after that amendment, as before, RFRA's statutory purpose remains to restore the compelling-interest test as set forth in this Court's decisions in *Sherbert* and *Yoder* and as applied in cases prior to *Smith*, see 42 U.S.C. 2000bb(b)(1).

The legislative history is equally clear in expressing Congress's expectation that courts applying RFRA would look to pre-*Smith* cases concerning the Free Exercise Clause of the First Amendment. See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993); see also *id.* at 9 ("the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*"); *id.* at 2 (the Act "responds to the Supreme Court's decision in * * * *Smith* by creating a statutory prohibition against government action

substantially burdening the exercise of religion") (footnote omitted).

b. In light of the expressly stated purpose of Congress, the court of appeals held that the persons whose religious exercise is protected by RFRA are those who had been recognized in the period between *Sherbert* and *Smith* as having rights under the First Amendment. Petitioners do not dispute that when Congress enacted RFRA, it did so against the background of decisions rejecting contentions that aliens outside U.S. territorial jurisdiction who lacked a substantial connection to the United States were entitled to First Amendment protections. See *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904); see also *Verdugo-Urquidez*, 494 U.S. at 265. Indeed, applying those principles in 1995, a year after RFRA was enacted, the Eleventh Circuit, relying on earlier circuit precedent, specifically held that aliens at Guantanamo Bay could not assert First Amendment rights. *Cuban Am. Bar Ass'n*, 43 F.3d at 1428-1430.

Because RFRA merely "restore[d] the compelling interest test as set forth in *Sherbert*," 42 U.S.C. 2000bb(b)(1) (emphasis added), because at the time RFRA was enacted, Congress would not naturally have seen that test as affording protection to aliens abroad who lacked a substantial connection to the United States, and finally because nothing occurred between the enactment of RFRA and the period of petitioners' detention to indicate any expansion of RFRA's coverage to such aliens, petitioners' RFRA claim against respondents must fail.[3] At a minimum, respondents

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[3] Although the Court in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), held that the Fair Labor Standards Act applied to aliens on a U.S. military base in Bermuda (and likened that base to Guantanamo Bay), the Court also made clear that analysis of the geographic application of a statute "depends upon the purpose of the statute." *Id.* at

are entitled to qualified immunity from those claims because the application of RFRA was not clearly established. At the time petitioners were detained (*i.e.*, between 2002 and March 2004), a reasonable official could have doubted that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war. A reasonable official could have concluded from RFRA's text and legislative history that the statute was designed merely to restore the legal standard governing free-exercise rights that had been established before 1990. See, *e.g.*, S. Rep. No. 111, *supra*, at 12 ("[T]he purpose of this act is *only* to overturn the Supreme Court's decision in *Smith*.") (emphasis added); see also pp. 20-22, *supra*. Moreover, a reasonable official would have been justified in relying on prior case law rejecting claims by aliens outside the United States in general—and aliens at Guantanamo Bay in particular—of violations of First Amendment rights. See, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265; *Cuban Am. Bar Ass'n*, 43 F.3d at 1428-1430; see also p. 22, *supra*. Indeed, any holding to the contrary would have been unprecedented. As Judge Brown wrote in her concurring opinion, the application of RFRA in "the military detention context would revolutionize the treatment of captured combatants." Pet. App. 21a. In such circumstances, the doctrine of qualified immunity prevents petitioners from suing respondents individually for money damages.

c. Petitioners mischaracterize the court of appeals' decision as holding that "because Guantánamo [Bay] detainees have no constitutional rights, they also have no

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378, 390. Given RFRA's purpose of restoring the pre-*Smith* standard for free-exercise claims, the discussion of Guantanamo Bay in *Vermilya-Brown* does little to establish that RFRA applies to aliens detained there.

rights under RFRA." Pet. 19. That is not what the court of appeals held. As explained above, the court of appeals specifically refrained from reaching the question of the applicability of various constitutional provisions to Guantanamo Bay. Instead, the court held that Congress intended RFRA in 1993 to cover individuals who at the time of enactment would have been recognized as possessing First Amendment free-exercise rights, and that petitioners did not fall within this covered set.

That holding is a conclusion about a particular statute's coverage, not a determination of the current state of the Constitution's application to aliens at Guantanamo Bay. And the court's alternative holding—that respondents are entitled to qualified immunity because RFRA did not clearly cover petitioners—similarly provides no indication of what constitutional rights are possessed by anyone now detained at Guantanamo Bay. The qualified immunity and statutory interpretation questions involved in this case are narrow and fact-specific. They do not conflict with any holdings of this Court or any court of appeals. They present no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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